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Scope of Collective Bargaining in Public Education: Toward a Comprehensive Balancing Test

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SCOPE OF COLLECTIVE BARGAINING IN PUBLIC EDUCATION: TOWARD A COMPREHENSIVE BALANCING TEST

I. INTRODUCTION

The emergence of teachers' associations[1] and the enactment of state public employment laws[2] have given teachers a more powerful voice in decisions that affect their working conditions. Thirty-three states have passed public employment relations acts (PERAs) which grant teachers and other public employees the right to bargain with their employers.[3] The scope clauses of these laws indicate which topics are

1. Teachers' unionism has experienced rapid growth in the last two decades. *See* Finch & Nagel, *Collective Bargaining in the Public Schools: Reassessing Labor Policy in an Era of Reform*, 1984 WIS. L. REV. 1573, 1580. The authors indicate that 88% of the nation's school teachers are members of either the National Education Association (NEA) or the American Federation of Teachers (AFT). *Id. See generally* A. CRESWELL & M. MURPHY, TEACHERS, UNIONS, AND COLLECTIVE BARGAINING IN PUBLIC EDUCATION 53-103 (1980); Gee, *The Unionization of Mr. Chips: A Survey Analysis of Collective Bargaining in the Public Schools*, 15 WILLAMETTE L. REV. 367, 374-80 (1979).

2. These statutes are typically entitled the Public Employment Relations Act (Michigan, Iowa) or Public Employees Collective Bargaining Act (Florida, Oregon). They apply to firemen, policemen, and other state or municipal employees. In addition, a number of states have enacted statutes pertaining specifically to public school teachers. *See, e.g.*, Meeting and Negotiating in Public Educational Employment, CAL. GOV'T CODE §§ 3540-3549 (West Supp. 1988); Arbitration of School Teacher Disputes, R.I. GEN. LAWS §§ 28-9.3-1 to -16 (1986); Labor Relations for Teachers, VT. STAT. ANN. tit. 16, §§ 1981-2010 (1982). *See infra* note 3 (for a complete listing of statutes).

3. Public sector collective bargaining acts are also a relatively recent development. Prior to 1965, only three states, Wisconsin, Michigan, and Connecticut, allowed public sector bargaining. Since the late 1960s, however, a majority of the states have enacted laws granting this right. *See* ALASKA STAT. § 14.20.550 (1987); CAL. GOV'T CODE § 3512 (West Supp. 1988); CONN. GEN. STAT. ANN. § 10-153a (West Supp. 1988); DEL. CODE ANN. tit. 14, § 4001 (1986); FLA. STAT. ANN. § 447.201 (West Supp.

negotiable and typically mandate bargaining as to "wages, hours, and other terms and conditions of employment."[4] The scope-of-bargaining debate focuses on the proper interpretation of these statutory provisions.[5]

1987); HAW. REV. STAT. § 89-1 (1985); IDAHO CODE § 20.9 (1980); ILL. ANN. STAT. ch. 48, para. 1701 (Smith-Hurd 1985); IND. CODE ANN. § 20-7.5-1-3 (Burns Supp. 1987); IOWA CODE ANN. § 20.9 (West Supp. 1987); KAN. STAT. ANN. § 72-5414 (1985); ME. REV. STAT. ANN. tit. 26, § 965 (West Supp. 1988); MD. EDUC. CODE ANN. § 6-408 (1985); MASS. ANN. LAWS ch. 150E, § 2 (Law. Co-op 1976); MICH. COMP. LAWS ANN. § 423.215 (West 1978); MINN. STAT. § 179A.01 (1984); MONT. CODE ANN. § 39-31-305 (1986); NEB. REV. STAT. § 48-214 (1987); NEV. REV. STAT. § 288.150 (1987); N.H. REV. STAT. ANN. § 273-A:3 (1987); N.J. STAT. ANN. § 34:13A-6 (West Supp. 1988); N.Y. CIV. SERV. LAW § 200 (McKinney 1983); N.D. CENT. CODE § 15-38.1-12 (1981); OHIO REV. CODE ANN. § 4117.04 (Anderson Supp. 1987); OKLA. STAT. ANN. tit. 70, § 509.2 (West Supp. 1988); OR. REV. STAT. § 243.656 (1986); PA. STAT. ANN. tit. 43, § 215.1 (Purdon Supp. 1988); R.I. GEN. LAWS § 36-11-7 (1984); S.D. CODIFIED LAWS ANN. § 3-18-2 (1985); TENN. CODE ANN. § 49-5-501 (1983); VT. STAT. ANN. tit. 16, § 2001 (1982); WASH. REV. CODE ANN. § 41.59.060 (West Supp. 1988); WIS. STAT. ANN. § 111.825 (West Supp. 1988).

4. *See* National Labor Relations Act § 8(d), 29 U.S.C. § 158(d) (1982) (scope provision of the National Labor Relations Act (NLRA)).

Twenty-seven states have adopted some variation of the phrase "wages, hours, and other terms and conditions of employment" into the scope provisions of their collective bargaining acts. *See, e.g.*, CAL. GOV'T CODE § 3543.2 (West Supp. 1988); ILL. ANN. STAT. ch. 48, para. 1704 (Smith-Hurd 1985); N.J. STAT. ANN. § 34:13A-5.3 (West Supp. 1987); WIS. STAT. ANN. § 111.91 (West Supp. 1987).

5. The primary responsibility for interpreting scope provisions usually rests with the state's public employment relations boards (PERBs). Courts often concede that scope determinations are classic issues for PERB's expertise and frequently defer to their decisions. Scope disputes normally reach the courts in the form of judicial review of an administrative agency decision. The court's inquiry is therefore limited to whether the board's decision was arbitrary, capricious, unreasonable, or contrary to law. *See, e.g.*, Clark County School Dist. v. Local Gov't, 90 Nev. 442, 446, 530 P.2d 114, 117 (1974) ("Unless the board should act arbitrarily beyond administrative boundaries, the court must give credence to the findings of the board."); Kansas Bd. of Regents v. Pittsburgh State Univ. Chapter of Kansas-NEA, 233 Kan. 801, 820, 667 P.2d 306, 320 (1983) (same).

The scope debate focuses primarily on the proper interpretation of the vague language "terms and conditions of employment." *See* NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342 (1958) (landmark Supreme Court case examining the proper scope of the NLRA provision).

Commentary exploring the scope of bargaining for public employees includes: *Developments in the Law - Public Employment*, 97 HARV. L. REV. 1611, 1682-1700 (1984) [hereinafter *Developments*]; H. EDWARDS, LABOR RELATION LAW IN THE PUBLIC SECTOR 293-469 (1985); Corbett, *Determining the Scope of Public Sector Collective Bargaining: A New Look Via a Balancing Formula*, 40 MONT. L. REV. 231 (1979); Sackman, *Redefining the Scope of Bargaining in Public Employment*, 19 B.C.L. REV. 155 (1977).

For commentary specifically addressing the scope of bargaining debate in the field of

Courts facing scope-of-bargaining disputes, whether in the public or private sector, must reconcile the fundamental tension between the employer's right to make managerial decisions and the employees' right to bargain over working conditions.[6] In the public sector, however, courts must also consider the employer's role as an elected official and the public's interest in efficient public services and an effective voice in the political decision-making process.[7] Defining the scope of collective bargaining, therefore, requires the court to balance the interests of employers, employees, and the voting public.[8]

This Note examines the scope of collective bargaining in the public sector, focusing on scope disputes in public education. Section II describes the bargaining process and presents examples of typical state collective bargaining acts. Section III reviews the basic theories that influence judicial interpretation of bargaining statutes. Section IV examines judicial approaches to bargaining topics that simultaneously pertain to working conditions and management rights. Finally, section V advocates a comprehensive balancing approach that acknowledges competing interests and provides a practical framework for resolving disputes.

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public education, see, e.g., Note, *Scope of Negotiations and Teacher/School District Contracts After Rapid City Education Association v. Rapid City Area School District No. 51-4*, 32 S.D.L. REV. 126 (1987) [hereinafter Note, *Scope of Negotiations after Rapid City*]; Finch & Nagel, *Collective Bargaining in the Public Schools: Reassessing Labor Policy in an Era of Reform*, 1984 WIS. L. REV. 1573, 1578-83; Note, *Mandatory Subjects of Bargaining Under the Kansas Public Employer-Employee Relations Act*, 32 U. KAN. L. REV. 697 (1984); Bowles, *Defining the Scope of Bargaining for Teacher Negotiations: A Study of Judicial Approaches*, 29 LAB. L.J. 649 (1978); Nelson, *State Court Interpretation of Teacher Collective Bargaining Statutes: Four Approaches to the Scope of Bargaining Issue*, 2 INDUS. REL. L.J. 421 (1977); Tepper & Melberg, *Scope of Bargaining for Teachers in California Public Schools*, 18 SANTA CLARA L. REV. 885 (1978).

See infra note 54 (listing commentary specifically addressing the political implications of public sector collective bargaining).

For commentary addressing the scope of bargaining in the private sector, see Note, *Subjects of Bargaining Under the NLRA and the Limits of Liberal Political Imagination*, 97 HARV. L. REV. 475 (1983); Harper, *Leveling the Road From* Borg-Warner *to* First National Maintenance: *The Scope of Mandatory Bargaining*, 68 VA. L. REV. 1447 (1982).

6. *See generally* Corbett, *supra* note 5.

7. *See infra* note 54 (listing commentary addressing the problem of public sector collective bargaining disrupting the democratic decision-making process); *see infra* notes 55-67 and accompanying text (discussing cases adopting the political process doctrine to limit the scope of public sector bargaining).

8. *See infra* notes 139-55 and accompanying text (discussing comprehensive balancing formulas that reconcile a variety of competing interests).

II. PUBLIC EMPLOYMENT RELATIONS ACTS

A. *The Private Sector Model*

State legislatures have looked to section 8(d) of the National Labor Relations Act (NLRA)[9] for guidance when drafting the scope provisions of their collective bargaining acts.[10] These provisions generally contain some form of the key phrase "wages, hours, and other terms and conditions of employment."[11] Slight variations in the statutory language, however, can imply a narrower or a broader scope of bargaining.[12] Proposals falling within this statutory language are mandatory subjects of bargaining.[13] Both parties are obligated to negotiate in good faith[14] with respect to mandatory subjects and may insist upon their positions to the point of impasse.[15] If an employer

9. NLRA § 8(d), 29 U.S.C. § 158(d) (1982). Congress enacted the NLRA in 1935 as the primary federal legislation governing collective bargaining in the private sector. *See* 29 U.S.C. §§ 151-69 (1982).

10. *See supra* note 4 (listing representative scope provisions modeled after § 8(d) of the NLRA).

11. *See, e.g.*, MICH. COMP. LAWS ANN. § 423.215 (West 1979) (containing language identical to § 8(d) of NLRA); ILL. ANN. STAT. ch. 48, para. 1607 (Smith-Hurd 1985) (providing that the employer and the exclusive employee representative have a duty to negotiate in good faith with respect to wages, hours, and other conditions of employment).

12. *Compare* IND. CODE ANN. § 20-7.5-1-4 (Burns 1985) (restricting bargaining to "salary, wages, hours, and salary and wage-related fringe benefits") *with* ALASKA STAT. § 14.20.550 (1987) (allowing negotiations on "matters pertaining to employment and the fulfillment of professional duties").

13. The separation of bargaining topics into two categories—mandatory and permissive—derives from the Supreme Court opinion in NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342 (1958). Justice Burton, writing for the majority, identified the mandatory category by reading NLRA § 8(a)(5), which makes an employer's refusal to bargain an unfair labor practice, in conjunction with § 8(d), which calls for bargaining on the subjects of wages, hours, and terms and conditions of employment. *See infra* notes 23-26 (discussing the permissive category).

14. *See* NLRA § 8(d), 29 U.S.C. § 158(d) (1982); *see generally* THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT 271-309 (C. Morris ed. 1971).

15. Employers and employees may condition their consent to a final contract agreement upon satisfactory resolution of mandatory issues. If no agreement is reached, they may invoke impasse procedures such as arbitration or review before a Public Employment Relations Board (PERB). Private sector employees may strike over mandatory issues, but most states prohibit strikes by public employees. *See infra* note 100 (listing state no-strike provisions); *see* Nelson, *supra* note 5, at 426; *see generally* Anderson, *Strikes and Impasse Resolution in Public Employment*, 67 MICH. L. REV. 943 (1969).

refuses to negotiate,[16] or if he acts unilaterally without consulting the bargaining representative, he may be charged with an unfair labor practice.[17]

State legislatures have also incorporated private sector case law into the scope provisions of their public employment acts.[18] Specifically, many states include a management rights provision exempting certain items from the collective bargaining process.[19] These clauses typically provide that managerial policy decisions such as the hiring, firing, and promotion of employees shall not be considered mandatory subjects of bargaining.[20] Some state courts consider management or policy deci-

16. *See, e.g.*, School Dist. of Drummond v. Wisconsin Employment Relations Comm'n, 121 Wis. 2d 126, 358 N.W.2d 285 (1984) (school district's failure to bargain over antinepotism policy, which was a mandatory topic, constituted a prohibited practice under WIS. STAT. ANN. § 111.70(3)(a)(4) (West Supp. 1988)).

17. Refusals to negotiate may also result in a court order to negotiate. Unilateral action taken by an employer on a mandatory topic may result in a court order to restore the *status quo ante*. Nelson, *supra* note 5, at 426. *See, e.g.*, Kent County Educ. Ass'n/Cedar Springs Educ. Ass'n v. Cedar Springs Pub. Schools, 157 Mich. App. 59, 403 N.W.2d 494 (1987) (board's unilateral action in changing hours without notice to bargaining unit constituted an unfair labor practice).

18. The leading private sector cases are: NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342 (1958) (developing mandatory and permissive bargaining categories); Chemical Workers Local 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971) (permissive categories); Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203 (1964) (developing management rights category).

19. *See, e.g.*, HAW. REV. STAT. § 89-9(d) (1985); MINN. STAT. ANN. § 179A.07 (West Supp. 1988); N.H. REV. STAT. ANN. § 273-A:1(xi) (Supp. 1987); PA. STAT. ANN. tit. 43, § 1101.702 (Purdon Supp. 1987); MONT. CODE ANN. § 39-31-303 (Supp. 1985); OHIO REV. CODE ANN. § 4117.08(c) (Anderson Supp. 1987).

The NLRA contains no equivalent "management rights" clause. This doctrine is derived from Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 223 (1964) (Stewart, J., concurring). Justice Stewart stated that certain managerial decisions "fundamental to the basic direction of the corporate enterprise" lie outside the scope of mandatory bargaining. *Id.*

20. For example, IOWA CODE ANN. § 20.7 (West 1987) provides:

> Public employers shall have . . . the exclusive power, duty, and the right to: 1. Direct the work of its public employees. 2. Hire, promote, demote, transfer, assign and retain public employees in positions within the public agency. 3. Suspend or discharge public employees for proper cause. 4. Maintain the efficiency of governmental operations. 5. Relieve public employees from duties because of lack of work or for other legitimate reasons. 6. Determine and implement methods, means, assignments and personnel by which the public employers' operations are to be conducted. 7. Take such actions as may be necessary to carry out the mission of the public employer. 8. Initiate, prepare, certify, and administer its budget. 9. Exercise all powers and duties granted to the public employer by law.

Id.

sions to be prohibited subjects of bargaining.[21] In this case, neither the employer nor the employee is permitted to negotiate, and any contractual agreement which includes them is unenforceable.[22]

Most states define bargaining proposals that do not fall within the mandatory category as "permissive." Consequently, most cases involve characterizing a topic as either mandatory or permissive.[23] Parties are permitted but not required to bargain over permissive subjects,[24] but neither side may insist to impasse.[25] Employers may act unilaterally with regard to permissive items, but if they agree to include such topics in a bargaining agreement, they must honor them.[26]

B. *Enumerated List Statutes*

Several states have enacted statutes specifically listing mandatory subjects,[27] apparently to avoid continuing dispute over the scope is-

21. Courts adopting the nondelegation theory, such as New Jersey, recognize only mandatory and nonnegotiable categories of bargaining. School officials may not bargain away subjects which are considered matters of delegated governmental authority. *See, e.g.*, Teaneck Bd. of Educ. v. Teaneck Teachers Ass'n, 94 N.J. 9, 14, 462 A.2d 137, 139 (1983); Board of Educ. of the Woodstown Pilesgrove School Dist. v. Woodstown Pilesgrove Educ. Ass'n, 81 N.J. 582, 588 n.1, 410 A.2d 1131, 1134 n.1 (1980).

22. *Developments, supra* note 5, at 1685.

23. *See, e.g.*, WISC. STAT. ANN.§ 111.70(1)(a) (West Supp. 1988) (matters reserved to management and direction of the governmental unit are permissive). Iowa courts have interpreted the Iowa collective bargaining statute to include only mandatory and permissive categories. *See* Aplington Community School Dist. v. Iowa Public Employment Relations Bd. 392 N.W.2d 495, 498 (Iowa 1986).

24. The permissive category also derives from NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342 (1958). After identifying mandatory subjects of bargaining, Justice Burton stated: "As to other matters, however, each party is free to bargain or not to bargain, and to agree or not to agree." *Id.* at 349.

25. *See, e.g.*, Orange County Police Benev. Ass'n v. City of Casselberry, 457 So. 2d 1125, 1128-29 (Fla. Dist. Ct. App. 1984) (City's insistence to point of impasse upon a permissive topic — the exclusion of disputes regarding discharge and demotion from the grievance procedure — constituted an unfair labor practice).

26. *See, e.g.*, Pennsylvania Labor Relations Bd. v. Vecchia, 90 Pa. Commw. 235, 245, 494 A.2d 1151, 1157 (1985) ("Once a public employer has entered into an agreement concerning matters of managerial prerogative regarding which there is no obligation to bargain, the employer will be bound.").

27. *See* The Professional Negotiations Act, KAN. STAT. ANN. § 72-5413(L) (1985) (defining "conditions of employment" with a list of enumerated items); The Public Employer-Employee Relations Act, KAN. STAT. ANN. § 75-4322(t) (1984) (defining "conditions of employment" for nonprofessional public employees); NEV. REV. STAT. § 288.150 (1987); IOWA CODE ANN. § 20.9 (West Supp. 1987); CAL. GOV'T CODE § 3543.2(a) (West Supp. 1988).

For example, IOWA CODE § 20.9 provides:

sue.[28] Some state legislatures intend their lists to be exclusive,[29] while others suggest the list is merely representational.[30] Also important is whether courts interpret the statutory language broadly or narrowly.[31] The distinctions between these approaches become evident when courts encounter a proposal that does not fall squarely within the list.[32]

The public employer and the employee representative shall . . . negotiate in good faith with respect to wages, hours, vacations, insurance, holidays, leaves of absence, shift differentials, overtime compensation, supplemental pay, seniority, transfer procedures, job classifications, health and safety matters, evaluation procedures, procedures for staff reduction, in-service training, and other matters mutually agreed on.

Id.

28. The number of cases in these states' courts, however, does not suggest the enumerated list statute approach reduces litigation. Recent scope of bargaining cases in Iowa include: Northeast Community School Dist. v. Public Employment Relations Bd. (PERB), 408 N.W.2d 46 (Iowa 1987) (public employee organization's proposal to school district concerning teacher evaluation procedures and grievance procedures constitutes mandatory subject of bargaining); Aplington Community School Dist. v. Iowa PERB, 392 N.W.2d 495, 500 (Iowa 1986) (teachers' association's proposed factors for teacher evaluations were encompassed within term "evaluation procedures" and thus were mandatory); Professional Staff Ass'n of Area Educ. Agency 12 v. PERB, 373 N.W.2d 516, 519 (Iowa Ct. App. 1985) (reimbursement for unused sick leave did not fall within "wages" or "supplemental pay" contained in enumerated list of mandatory topics); Saydel Educ. Ass'n v. PERB, 333 N.W.2d 486, 489 (Iowa 1983) (section 20.9 requires bargaining on a broad range of teacher qualifications bearing on transfer or reduction decisions).

29. For example, the Nevada scope provision begins, "The scope of mandatory bargaining shall be limited to . . . " a list of enumerated items. NEV. REV. STAT. § 288.150(2) (1987). Although Nevada provides an extensive list of mandatory items, the introductory language may confine bargaining exclusively to those items listed.

30. The Oregon scope provision provides, " 'Employment relations' includes, but is not limited to, matters concerning direct or indirect monetary benefits, hours, vacations, sick leave, grievance procedures, and other conditions of employment." OR. REV. STAT. § 243.650(7) (1983). Although the Oregon statute lists far fewer mandatory items, the expansive language "is not limited to" and "matters concerning" allows courts greater discretion to hold unenumerated items mandatory. *See, e.g.*, Springfield Educ. Ass'n v. Springfield School Dist. No. 19, 290 Or. 217, 621 P.2d 547 (1980) (legislature chose to define employment relations by example to allow Board to include other subjects of like character).

31. This question involves deciding whether a bargaining proposal falls within the definition of an enumerated item. The Nevada statute, for example, includes "safety," which could be read broadly to include bargaining over student disciplinary policy. *See* Bowles, *supra* note 5, at 653.

32. This problem illustrates the inflexibility of list statutes, especially the exclusive lists, which give courts limited discretion to evolve their decision making in accordance with changes in the workplace, absent the burdensome process of continual statutory amendment. *Id.*

The California Educational Employment Relation Act (EERA)[33] attempts to avoid scope disputes by listing mandatory items and reserving all other topics to the discretion of the public school employer.[34] Nevertheless, in *San Mateo City School District v. Public Employment Relations Board*,[35] the California Supreme Court, relying on statutory language in the scope provision that allowed negotiation on matters "relating to" wages, hours, and other terms of employment,[36] held that unenumerated items could be subject to mandatory bargaining.[37] Similarly, in *Unified School District No. 501 v. Secretary of Kansas Department of Human Resources*,[38] the Kansas Supreme Court held that proposals falling "within the purview" of enumerated items in their list statute were mandatorily negotiable.[39]

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33. CAL. GOV'T CODE §§ 3540-49 (West Supp. 1988).

34. CAL. GOV'T CODE § 3543.2(a) (West Supp. 1988).

35. 33 Cal. 3d 850, 663 P.2d 523, 191 Cal. Rptr. 800 (1983). The San Mateo City School District petitioned for a review of a finding by PERB that it had committed an unfair labor practice by refusing to negotiate on certain teacher association proposals, even though the proposals were not specifically enumerated in the list of mandatory subjects. *Id.* at 853, 663 P.2d at 525, 191 Cal. Rptr. at 802.

36. CAL. GOV'T CODE § 3543.2(a) (West Supp. 1988). This provision contains language similar to § 8(d) of the NLRA and an enumerated list of items. The court relied on the former, which provides: "The scope of representation shall be limited to matters *relating to* wages, hours of employment, and other terms and conditions of employment." *Id.* (emphasis added). The court found that the inclusion of this broad language, rather than the adoption of an exclusive list of negotiable items, implied that the legislature intended to grant PERB some flexibility when making scope determinations. 33 Cal. 3d at 858-59, 663 P.2d at 528, 191 Cal. Rptr. at 805. *See infra* note 147 (discussing the court's deference to PERB's construction of scope provision language).

37. 33 Cal. 3d at 862, 663 P.2d at 531, 191 Cal. Rptr. at 808. The court upheld the reasonableness of PERB's interpretation, which emphasized the expansive language "matters relating to" and deemphasized the restrictive language "shall be limited to." *Id.* The court held that the reservation of unenumerated items to the employer was not intended to eliminate the flexibility provided by the "matters relating to" language. *Id.*

For additional discussion of the scope provision of California's EERA, see Mathiason, *Scope of Bargaining: The Management Perspective*, 18 SANTA CLARA L. REV. 861 (1978); Tepper & Melberg, *Scope of Bargaining for Teachers in California's Public Schools*, 18 SANTA CLARA L. REV. 885 (1978); Herman, *Scope of Representation Under the Rodda Act: Negotiable and Non-negotiable Issues*, 32 CPER 14 (1977).

38. 235 Kan. 968, 685 P.2d 874 (1984). The school district appealed a decision which held proposals regarding access to employee files and the mechanics of staff reduction and student teacher programs to be mandatorily negotiable.

39. *Id.* at 969, 685 P.2d at 875. The court adopted a topics approach which does not require a proposed item to be specifically listed under KAN. STAT. ANN. § 72-5413(L) (1985) in order for the court to find it mandatorily negotiable. Accordingly, the court held that access to employees' files and the mechanics of staff reduction fell

Iowa courts have been more reluctant to find unenumerated topics bargainable. Iowa courts characterize their list statute as exclusive and read the statutory language literally.[40] In *Fort Dodge Community School District v. Public Employment Relations Board*,[41] the Iowa Supreme Court defined "wages" as "pay given for labor."[42] The court concluded that because cash incentives for early retirement could not be considered wages, the topic was not mandatorily negotiable.[43]

III. JUDICIAL INTERPRETATION OF COLLECTIVE BARGAINING STATUTES

A. *Narrowing the Scope of Bargaining*

1. Managerial Prerogative

The "management rights" or "managerial prerogative" theory is the most common rationale courts employ to limit the scope of collective

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within the purview of "termination and nonrenewal of contracts" and "reemployment." 235 Kan. at 971-74, 685 P.2d at 878-79.

See also Kansas Bd. of Regents v. Pittsburgh State Univ. Chapter of Kansas-NEA, 233 Kan. 801, 667 P.2d 306 (1983). This case involved an action brought under a similar statute, KAN. STAT. ANN. § 75-4322(t) (1985). The court held that the legislature did not intend the enumerated list of subjects to be literal, but that school officials must negotiate all items which *relate to* the enumerated subjects. 233 Kan. at 821, 667 P.2d at 317. For a discussion of the latter case, see Note, *Mandatory Subject of Bargaining Under the Kansas Public Employer-Employee Relations Act*, 32 KAN. L. REV. 697 (1984).

See also National Educ. Ass'n-Kansas City v. Unified School Dist. No. 500, 4 Kan. 563, 608 P.2d 415 (1980) (proposal regarding number of required after-hours faculty meetings, grade card preparation time, and duty-free planning period mandatory as within hours and amount of work); Chee-Craw Teachers Ass'n v. Unified School Dist. No. 247, 225 Kan. 561, 593 P.2d 406 (1979) (length of workday, arrival and departure times, number of teaching periods, and duty-free lunch are mandatory topics).

40. Iowa courts first articulated this restrictive reading in City of Fort Dodge v. Iowa PERB, 275 N.W.2d 393 (Iowa 1979). Looking to the legislative history, the court noted that while the original version of § 20.9 allowed bargaining for "other terms and conditions of employment," the final bill excluded this language and adopted a specific list. The court concluded that the legislature intended a strict, exclusive interpretation. *Id.* at 398. *See supra* note 27 (Iowa's list statute).

41. 319 N.W.2d 181 (Iowa 1982).

42. *Id.* at 183.

43. *Id.* at 183-84. Noting that the legislature had declined to make any statutory changes subsequent to the court's restrictive reading in prior cases, the court again adopted a literal reading of § 20.9. *Id.* at 183.

See supra note 28 (for additional Iowa holdings). *See generally* Pope, *Analysis of the Iowa Public Employment Relations Act*, 24 DRAKE L. REV. 1 (1974).

bargaining. Borrowing from private sector case law,[44] courts adopting this theory[45] hold that management should be free to make decisions that are "fundamental to the basic direction of the corporate enterprise."[46] This theory suggests that an employer can make managerial decisions more efficiently and effectively without collective bargaining.[47] Many state public employment statutes include a management rights clause.[48] In addition, courts frequently use the "managerial prerogative" theory to deny mandatory bargaining.[49]

The Connecticut Supreme Court, in *West Hartford Education Association v. DeCourcy*,[50] observed that in the context of public education, educational policy was the equivalent of managerial policy.[51] The court held that decisions fundamental to the existence, direction, and operation of the school enterprise fall outside the scope of bargaining.[52] The court concluded that school district decisions regarding the establishment of extracurricular programs were matters of educational policy and therefore were excluded from the scope of mandatory bargaining.[53]

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44. *See* Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203 (1964); First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666 (1981).

45. *See, e.g.*, Board of Educ. of School Dist. for City of Detroit v. Parks, 417 Mich. 268, 276, 335 N.W.2d 641, 645 (1983) ("In construing PERA, this court has frequently sought guidance from federal court decisions construing analogous provisions of the NLRA."); *but see* Paterson PBA, Local No. 1 v. City of Paterson, 87 N.J. 78, 90, 432 A.2d 847, 853 (1981) ("Federal precedents concerning the scope of collective bargaining in the private sector are of little value in determining the permissible scope of negotiability in public employment labor relations.").

46. *Fibreboard*, 379 U.S. at 223 (Stewart, J., concurring).

47. *See, e.g.*, San Mateo City School Dist. v. PERB, 33 Cal. 3d 850, 863, 663 P.2d 523, 531, 191 Cal. Rptr. 800, 808 (1983) ("Public entities do not operate for profit, but must accommodate the needs of their constituents for efficient and affordable public services."); Michigan Law Enforcement Union, Teamsters Local 129 v. City of Highland Park, 138 Mich. App. 342, 360 N.W.2d 611 (1984) (bargaining mandatory only if the proposal does not significantly abridge the employer's freedom to manage his business and does not alter the employer's basic operation).

48. *See supra* notes 19-20 (citing representative management rights provisions).

49. Despite its frequent application, commentators often criticize the managerial prerogative doctrine because it contravenes the basic policy goal of harmonious labor relations by deferring to management, and because it fails to recognize the public employer's role as political decisionmaker. *See Developments, supra* note 5, at 1689-91.

50. 162 Conn. 566, 295 A.2d 526 (1972).

51. *Id.* at 583, 295 A.2d at 536.

52. *Id.*

53. *Id.* at 585-87, 295 A.2d at 536-37. The court did find, however, that the *impact*

2. Political Process

Many courts and commentators have opposed collective bargaining in the public sector, arguing that it distorts the democratic decision-making process.[54] Proponents of the political process theory contend that public sector bargaining gives employee unions undue influence in political decisions by granting them direct and exclusive access to their employers, who are elected officials.[55] As a result, the voting public's opportunity to participate in matters of public policy is compromised. Courts employing this theory restrict the scope of bargaining to offset the political clout of public employee unions.[56]

In *Ridgefield Park Education Association v. Ridgefield Park Board of Education*[57] the New Jersey Supreme Court adopted this position, holding that representative government would be endangered if governmental policy decisions were left to collective negotiation where citizen participation is excluded.[58] The court indicated a reluctance to sanction bargaining over managerial decisions, noting that the true managers are the people.[59] Similarly, in *In re Local 195, IFPTE, AFL-*

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of this decision on teacher assignments and compensation was bargainable. *Id. See infra* text accompanying notes 124-31 (discussing severability of policy and impact).

54. *See generally* H. WELLINGTON & R. WINTER, THE UNIONS AND THE CITIES 24-29 (1971); C. Summers, *Public Employee Bargaining: A Political Perspective*, 83 YALE L.J. 1156 (1974); Love & Sulnzer, *Political Implications of Public Employee Bargaining*, 11 INDUS. REL. L.J. 18 (1972); R. Summers, *Public Sector Collective Bargaining Substantially Diminishes Democracy*, 1 GOV'T UNION REV. 5 (1980); Note, *Collective Bargaining and Politics in Public Employment*, 19 UCLA L. REV. 887 (1972); Wellington & Winter, *The Limits of Collective Bargaining in Public Employment*, 78 YALE L.J. 1107, 1126 (1969).

Articles that challenge the political process theory include: Wollett, *The Coming Revolution in Public School Management*, 67 MICH. L. REV. 1017 (1969); Cohen, *Does Public Employee Unionism Diminish Democracy*? 32 INDUS. & LAB. REL. REV. 189 (1979); Note, *Collective Bargaining and the Professional Employee*, 69 COLUM. L. REV. 277, 291 (1969).

55. *See, e.g.*, Ridgefield Park Educ. Ass'n v. Ridgefield Park Bd. of Educ., 78 N.J. 144, 162, 393 A.2d 278, 286-87 (1978) (arguing that there would be little room for community involvement if agreements concerning educational policy matters could be negotiated behind closed doors).

56. *See, e.g.*, *Ridgefield Park*, 78 N.J. at 163, 393 A.2d at 287; *In re* IFPTE Local 195 v. State, 88 N.J. 393, 402, 443 A.2d 187, 191 (1983); West Bend Educ. Ass'n v. Wisconsin Employment Relations Comm'n, 121 Wis. 2d 1, 8, 357 N.W.2d 534, 538 (1984); Unified School Dist. No. 1 of Racine County v. WERC, 81 Wis. 2d 89, 259 N.W.2d 724 (1977).

57. 78 N.J. 144, 393 A.2d 278 (1978).

58. *Id.* at 163, 393 A.2d at 287.

59. *Id.* The court held that negotiating the issue of teacher transfers was impermis-

CIO v. State[60] the same court stressed that matters of public policy are best determined through public debate, lobbying, voting, and legislation.[61] The court noted that its role in scope questions was to determine whether an issue should be decided by the political process or by collective negotiations.[62] The court held that topics which significantly interfere with determinations of governmental policy are nonnegotiable.[63]

In *San Mateo City School District v. Public Employment Relations Board*,[64] the school district argued that because collective bargaining transforms the multilateral nature of governmental decision making into a bilateral process, California's scope provision should be read restrictively.[65] The California Supreme Court acknowledged the importance of public participation in decisions affecting education, but declined to read the scope provision restrictively.[66] Instead, the court pointed to provisions in the EERA requiring contract proposals to be presented at public meetings. This requirement, the court concluded, gave the public an opportunity to be fully informed and to express its views.[67]

3. Nondelegation

The nondelegation theory resembles the political process model in its focus on the role of the public employer as government. Instead of emphasizing public participation in policy, the nondelegation theory stresses that the state legislature delegated certain powers to the public employer which cannot be "bargained away" to private interest groups.[68] Proponents of this theory insist that representative officials

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sible because bargaining would interfere with the school board's inherent managerial responsibilities to determine governmental policy. *Id.* at 156, 393 A.2d at 284.

60. 88 N.J. 393, 443 A.2d 187 (1983).

61. *Id.* at 402, 443 A.2d at 191.

62. *Id.*

63. *Id.* at 404, 443 A.2d at 192.

64. 33 Cal. 3d 850, 663 P.2d 523, 191 Cal. Rptr. at 809 (1983). *See supra* note 35 (discussing facts).

65. 33 Cal. 3d at 863-64, 663 P.2d at 532, 191 Cal. Rptr. at 809.

66. *Id.* at 864, 663 P.2d at 532, 191 Cal. Rptr. at 809.

67. *Id.*

68. *See, e.g.*, Board of Educ. of Woodstown-Pilesgrove School Dist. v. Woodstown Pilesgrove Educ. Ass'n, 81 N.J. 582, 589, 410 A.2d 1131, 1134 (1980) ("If the subject is a matter which has been delegated by the legislature to the Board of Education, it cannot be 'bargained away.' "); Bernards Township Bd. of Educ. v. Bernards Township

alone must make decisions involving traditional governmental functions.[69] Therefore, neither the employees nor the employer may negotiate issues of inherent governmental policy.[70]

The Maryland Court of Appeals considered whether a school board could delegate its duty to make tenure decisions to an arbitrator in *Board of Education of Carroll County v. Carroll County Education Association*.[71] The court observed that the statutory chain of responsibility from the General Assembly, delegated through the state school board to the local school systems, clearly indicated that the local board had authority to determine tenure.[72] Consequently, the court prohibited the board from engaging in arbitration over tenure decisions.[73]

In *Three Village Teachers' Association v. Three Village Central School District*,[74] the New York Supreme Court Appellate Division noted that the school district was exclusively responsible for establishing teacher qualifications and selecting applicants.[75] The court held, therefore, that an arbitrator could not challenge the district's nondelegable hiring decision.[76]

Educ. Ass'n, 79 N.J. 311, 399 A.2d 620 (1979); Wycokoff Township Bd. of Educ. v. Wycokoff Educ. Ass'n, 168 N.J. Super. 497, 501, 403 A.2d 916, 918 (App. Div. 1979) (decision to retain teacher nondelegable).

69. *See, e.g.*, St. Paul Fire Fighters, Local 21 v. City of St. Paul, 336 N.W.2d 301, 303 (Minn. 1983) (decision to establish an officers training program is a nonnegotiable traditional governmental function).

70. Courts adopting the nondelegation doctrine hold that governmental policy decisions are "prohibited," rather than "permissive" topics of bargaining. *See, e.g.*, Ridgefield Park Educ. Ass'n v. Ridgefield Park Bd. of Educ., 78 N.J. at 163, 393 A.2d at 287.

71. 53 Md. 355, 452 A.2d 1316 (1982).

72. *Id.* at 357, 452 A.2d at 1318. *See also* MD. EDUC. CODE ANN. § 6-201(f) (1985) (providing that the county board shall determine tenure).

73. 53 Md. at 359, 452 A.2d at 1319. *See also* Howard Bd. of Educ. v. Howard Educ. Ass'n, 61 Md. 631, 487 A.2d 1220 (1985) (county boards cannot bargain away matters dealing with the establishment of educational policy).

74. 128 A.D.2d 626, 512 N.Y.S.2d 878 (App. Div. 1987).

75. *Id.* at 627, 512 N.Y.S.2d at 879. *See* N.Y. EDUC. LAW § 2573[9] (Consol. 1985).

76. 128 A.D.2d at 627, 512 N.Y.2d at 879. New York courts frequently invoke the nondelegation doctrine. *See, e.g.*, Matter of Cohoes City School Dist. v. Cohoes Teachers Ass'n, 40 N.Y.2d 774, 358 N.E.2d 878, 390 N.Y.S.2d 53 (N.Y. App. Div. 1976) (tenure decision nondelegable); Honeoye Falls-Lima Cent. School Dist. v. Honeoye Falls-Lima Educ. Ass'n, 49 N.Y.2d 732, 402 N.E.2d 1165, 426 N.Y.S.2d 263 (1980) (job security of tenured teachers not subject to arbitration); Board of Educ. of Elwood Union Free School Dist. v. Elwood Teachers Alliance, 94 A.D.2d 692, 461 N.Y.S.2d

4. Interest of the Student

Courts occasionally exclude topics from negotiation because of their potentially adverse impact on students.[77] This rationale emphasizes that the primary duty of a school board is to deliver high quality education to its students; therefore, bargaining proposals that interfere with this duty should not be mandatory.[78]

The Indiana Court of Appeals adopted this position in *Eastbrook Community Schools Corp. v. Indiana Educational Employment Relations Board*.[79] The court conceded that the school calendar affected the working conditions of teachers, but determined that the calendar's effect on students outweighed the private interests of teachers.[80] The court held that because the protection of students' interests was the predominant goal, the school calendar was not a proper subject for mandatory bargaining.[81]

In *Ridgefield Park*[82] the New Jersey Supreme Court agreed that transfer decisions affected working conditions.[83] The court concluded, however, that the board's duty to deploy teachers so that students would receive a thorough and efficient education was a nondelegable

891 (1983) (contract provisions interfering with school board's nondelegable function to determine tenure is unenforceable as contrary to public policy).

77. *See, e.g.*, San Mateo City School Dist. v. PERB, 33 Cal. 3d 850, 863, 663 P.2d 523, 531, 191 Cal. Rptr. 800, 808 (1983) (public policy renders the welfare of those receiving the service a primary consideration); Wright v. Board of Educ. of City of E. Orange, 99 N.J. 112, 121, 491 A.2d 644, 648 (1985) (in determining negotiability, court focuses primarily on extent to which students and teachers are congruently involved); Board of Educ. of Woodstown-Pilesgrove v. Woodstown-Pilesgrove Educ. Ass'n, 81 N.J. 582, 592, 410 A.2d 1131, 1136 (1980) (same); Biddeford v. Biddeford Teachers Ass'n, 304 A.2d 387, 421 (Me. Sup. Jud. Ct. 1973) (school year and vacation schedule, at least where student and teachers are congruently involved, are matters of nonnegotiable educational policy); Monroe-Woodbury Cent. School Dist. v. Monroe-Woodbury Teachers Ass'n, 105 A.D.2d 786, 786, 481 N.Y.S.2d 731, 731 (N.Y. App. Div. 1984) (public policy prohibits school district from bargaining away its responsibility to maintain adequate classroom standards).

78. Eastbrook Community Schools Corp. v. Indiana EERB, 446 N.E.2d 1007, 1013 (Ind. App. 1983).

79. 446 N.E.2d 1007 (Ind. App. 1983).

80. *Id.* at 1013.

81. *Id.* The court adopted the position taken by the Supreme Court of New Jersey in *Woodstown-Pilesgrove*, 81 N.J. at 592, 410 A.2d at 1136 (establishment of school calendar nonnegotiable where students and teachers are congruently involved).

82. 78 N.J. 144, 393 A.2d 278 (1978).

83. *Id.* at 156, 393 A.2d at 284.

managerial decision.[84]

5. Statutory Conflict

Finally, courts may determine that a bargaining proposal is outside the scope of negotiation because it conflicts with a provision in the state civil service system,[85] another statute,[86] or a local law.[87] The statutory

84. *Id.* The court later observed that bargaining over issues of educational policy would be improper because the interests of teachers do not always coincide with the interests of the students. *Id.* at 165, 393 A.2d at 288.

See generally Symposium on Teacher Bargaining, 50 INDUS. L.J. 344 (1974) (discussing conflicting interests of students, teachers, and public); *but see* Minneapolis Fed'n of Teachers, Local 59 v. Minneapolis Special School Dist. No. 1, 258 N.W.2d 802, 805 (Minn. 1977) ("Both administrators and school boards, on the one hand, and teachers on the other, must be deemed to have the interests of the students at heart.").

85. *See, e.g.*, Sonoma County Bd. of Educ. v. PERB, 102 Cal. App. 3d 689, 163 Cal. Rptr. 464 (1980); Wiener v. Board of Educ., 90 A.D.2d 832, 455 N.Y.S.2d 828 (1982); State v. State Supervisory Employees Ass'n, 78 N.J. 54, 393 A.2d 233 (1978).

86. Cases holding that the existence of a conflict between a statewide collective bargaining statute and another state statute did not limit the scope of bargaining include: Michigan Council 25, Am. Fed'n of State, County & Mun. Employees, AFL-CIO v. St. Clair Co., 136 Mich. App. 721, 357 N.W.2d 750 (1984) (despite prosecutor's right under MICH. COMP. LAWS §§ 49.41, 49.42 (1979) to hire and fire assistants at will, MERC could require negotiation, since grounds for employee discharges are a condition of employment); Oak Park Educ. Ass'n MEA/NEA v. Oak Park Bd. of Educ., 132 Mich. App. 680, 348 N.W.2d 9 (1984) (where there is a conflict between PERA and another statute, PERA prevails); Tracy v. Ostego Bd. of Educ., 6 Ohio St. 3d 305, 453 N.E.2d 610 (1983) (bargaining provision requiring nonrenewal notification did not overly restrict board's statutory right to not renew contracts).

Cases holding that conflict with a state statute does limit the scope of bargaining include: Bethlehem Township Bd. of Educ. v. Bethlehem Township Educ. Ass'n, 177 N.J. Super. 479, 427 A.2d 80 (App. Div. 1981) (State Board of Education regulations governing teacher evaluations preempted evaluation proposals submitted by teachers' association); California Teachers' Ass'n v. Parlier Unified School Dist., 157 Cal. App. 3d 174, 201 Cal. Rptr. 20 (1984) (collective bargaining agreement cannot waive benefits provided by Education Code); Council of N.J. State College v. State Bd. of Higher Educ., 91 N.J. 18, 449 A.2d 1244 (1982) (right of public employees to negotiate over working conditions limited if subject matter is already addressed by legislature).

87. Generally courts have held that a local ordinance or city charter cannot impose any limitation upon the scope of bargaining. *See, e.g.*, School Comm. of Newton v. Labor Relations Bd., 388 Mass. 557, 447 N.E.2d 1201 (1983) (provision in city charter authorizing school committee to discharge employees at its pleasure did not preclude committee from being required to negotiate over decision to layoff janitors); *but see* United Pub. Employees, Local 390/400, S.E.I.U., AFL-CIO v. City and County of San Francisco, 190 Cal. App. 3d 419, 235 Cal. Rptr. 477 (1987) (amount of compensation paid to city employees is strictly local affair and is not preempted by general collective bargaining law).

See generally H. EDWARDS, LABOR RELATIONS LAW IN THE PUBLIC SECTOR 369-

conflict issue typically arises when the bargaining agent asserts that the collective bargaining statute mandates bargaining, whereas the school district claims that another statute, often a state educational code, exempts the topic from negotiations.[88] Occasionally, courts can look to statutory language that either suggests preemptive intent[89] or resolves conflicts in favor of the PERA.[90]

If no clear statutory directives exist, courts initially attempt to harmonize conflicting statutes by considering them equally valid.[91] If statutory reconciliation fails, judicial resolution varies. However, courts frequently acknowledge the contribution collective bargaining makes to stable labor relations[92] and consider bargaining statutes preempted only if there is an emphatic statutory mandate to do so.[93]

The New Jersey Supreme Court established a standard for resolving statutory conflicts in *State v. State Supervisory Employees Association.*[94] The court held that terms of employment are preempted by other statutes controlling identical subject matter[95] if the other statute speaks in

406 (1985) (discussing the effect of civil service laws and other statutory provisions on collective bargaining acts).

88. *See supra* notes 85-87 (listing cases).

89. Some state legislatures intend to give civil service laws or other statutes a preemptory effect over collective bargaining laws. *See, e.g.*, IOWA CODE ANN. § 20.28 (West Supp. 1987); WASH. REV. CODE ANN. § 41.56.100 (West Supp. 1987).

90. *See, e.g.*, CONN. GEN. STAT. ANN. §§ 5-278(c) (West Supp. 1988); HAW. REV. STAT. § 89-10(d) (1985); ILL. ANN. STAT. ch. 48, para. 1607, § 7 (Smith-Hurd 1985); MASS. ANN. LAWS ch. 150E, § 7(d) (Law. Co-op Supp. 1987). *See, e.g.*, City of Decatur v. Illinois State Labor Relations Bd., 149 Ill. App. 3d 319, 500 N.E.2d 573 (1986) (relying on ILL. REV. STAT. ch. 48, para 1607, § 7 (1985)).

91. *See, e.g.*, Connecticut Educ. Ass'n v. State Bd. of Labor Relations, 5 Conn. App. 253, 498 A.2d 102 (1985) (requiring mandatory bargaining for layoff procedures is consistent with public policy of the Teacher Tenure Act); Fraternal Order of Police, Ionic County Lodge No. 157 v. Bensinger, 122 Mich. App. 437, 442, 333 N.W.2d 73, 75 (1983) (defendant arguing in alternative that court should construe overlapping statutes so as to give effect to both); San Mateo City School Dist. v. PERB, 33 Cal. 3d 850, 865, 663 P.2d 523, 532, 191 Cal. Rptr. 800, 809 (1983) (reading language of the Education Code in harmony with, rather than preempting, EERA).

92. *See, e.g.*, Certificated Employees Council v. Monterey Peninsula Unified School Dist., 42 Cal. App. 3d 328, 116 Cal. Rptr. 819 (1974) (permitting parties to meet and confer on tenure matters promotes orderly and uniform communication between teachers and administrators).

93. *See, e.g., San Mateo*, 33 Cal. 3d at 864-65, 663 P.2d at 532, 191 Cal. Rptr. at 809 (unless language of Education Code clearly evidences an intent to set an inflexible standard, the court should not preclude negotiability).

94. 78 N.J. 54, 393 A.2d 233 (1978).

95. *Id.* at 81, 393 A.2d at 246.

the imperative and leaves nothing to the discretion of the public employer.[96] In addition, the court held that if the statute merely sets a minimum level of employee rights, then negotiations regarding enhanced employee protection are mandatory. If the statute sets a minimum and a maximum level of employee rights, negotiations may proceed within these parameters.[97] The court concluded, however, that bargaining proposals relating to pension benefits were nonnegotiable because comprehensive pension regulations indicated legislative intent to preempt the field.[98]

B. *Expanding the Scope of Bargaining*

1. Harmonious Labor Relations

A basic legislative goal of collective bargaining statutes is the furtherance of equitable and harmonious labor relations. PERA preambles frequently acknowledge the public's interest in stability among employers and employees who provide public services.[99] However, most public sector bargaining laws deny workers a fundamental economic tool that is available to private sector employees — the right to strike.[100] Courts often favor expanding the scope of public sector bargaining to ensure harmonious labor relations and to compensate public employees for the strike prohibition.[101]

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96. *Id.*

97. *Id.* at 81-82, 393 A.2d at 246-47.

98. *Id.* at 83, 393 A.2d at 247.

Cases adopting the standard developed in *State Supervisory* include: Wright v. Board of Educ. of the City of E. Orange, 99 N.J. 112, 491 A.2d 644 (1985) (no preemption of negotiability of custodians' tenure rights because statute left school district with considerable discretion); *In re* IFPTE Local 195 v. State, 88 N.J. 393, 443 A.2d 187 (1982) (negotiation as to subcontracting not preempted).

99. *See, e.g.*, IND. CODE ANN. § 20-7.5-1-3 (Burns Supp. 1987) (acknowledging that Indiana citizens have a fundamental interest in harmonious relations between school corporations and teachers, and that school employers' recognition of their employees' right to organize and bargain collectively can alleviate various forms of labor unrest).

100. *See, e.g.*, CONN. GEN. STAT. ANN. § 10-153(e) (West Supp. 1988); FLA. STAT. ANN. § 447.505 (West Supp. 1987); IND. CODE ANN. § 20-7.5-1-14 (Burns Supp. 1987); KAN. STAT. ANN. § 72-5423(c) (1985); ME. REV. STAT. ANN. tit. 26, § 964(2) (Supp. 1987); MD. ANN. CODE art. 77, § 160A(m) (1985); MICH. COMP. LAWS § 423.202 (1979); NEV. REV. STAT. § 288.230 (1987); N.H. REV. STAT. ANN. § 273A: 13 (1987); N.Y. CIV. SERV. LAW § 210 (McKinney 1983); S.D. CODIFIED LAWS ANN. § 3-18-10 (1985); WIS. STAT. ANN. § 111.89 (West Supp. 1987).

101. *See, e.g.*, Town of Stratford v. Local 134, IFPTE, 201 Conn. 577, 519 A.2d 1 (1986) (holding that public's interest in peaceful adjustment of labor disputes and promotion of industrial stabilization through collective bargaining mandated negotiation

Michigan courts endorse a broader scope of bargaining in the public sector than in the private sector. In *West Ottawa Education Association v. West Ottawa Public Schools Board of Education*,[102] the Michigan Supreme Court reasoned that because the Michigan PERA prohibits strikes, a liberal view of what constitutes a mandatory subject of bargaining was appropriate for public sector scope disputes.[103] The court further expanded the scope of negotiations by broadly defining a "term and condition of employment" as any matter which settles an aspect of the relationship between employers and employees.[104]

2. Significant Relation Test

Another rationale that tends to expand the scope of bargaining is the significant relation test. This approach suggests that if a proposal for negotiation is "significantly related" to wages, hours, and terms and conditions of employment, it should be mandatory.[105]

The Nevada Supreme Court articulated the "significantly related" test in *Clark County School District v. Local Government Employee-Management Relations Board*.[106] The court determined that a number of disputes between the school district and the teachers' association were negotiable, including class size, professional improvement, student discipline, school calendar, and teacher performance.[107] The court held that a governmental employer must negotiate matters significantly related to wages, hours, and working conditions, even if the

over special compensation); University Educ. Ass'n v. Regents of Univ. of Minnesota, 353 N.W.2d 534, 538 (Minn. 1984) (purpose of PERA requires scope of mandatory bargaining to be broadly construed so that the purpose of resolving labor disputes through negotiation can best be served).

102. 126 Mich. App. 306, 337 N.W.2d 533 (1983).

103. *Id.* at 315, 337 N.W.2d at 539. *See* MICH. COMP. LAWS § 423.202 (1979) (strike prohibition provision); Detroit Police Officers Ass'n v. Detroit, 61 Mich. App. 487, 233 N.W.2d 49 (1975).

104. 126 Mich. App. at 322, 337 N.W.2d at 542. *See also* Houghton Lake Educ. Ass'n v. Houghton Lake Bd. of Educ., 109 Mich. App. 1, 6, 310 N.W.2d 888, 890 (1981).

105. Courts rarely examine the relationship of the bargaining item to working conditions in isolation. Instead courts also consider the proposal's effect on managerial decisions. As a result, this approach has been superseded by the "impact balancing" approach, which weighs a topic's effect on working conditions against its intrusion on managerial policy. *See infra* notes 132-38 and accompanying text (for further discussion of this approach).

106. 90 Nev. 442, 530 P.2d 114 (1974).

107. *Id.* at 447-48, 530 P.2d at 118.

subject is also related to management prerogatives.[108]

IV. TOWARD A BALANCED APPROACH

Perhaps the most troublesome problem courts encounter when addressing scope disputes is how to characterize bargaining proposals that fall concurrently within the meaning of "management rights" and "terms and conditions of employment."[109] For example, decisions regarding class size[110] and school calendar[111] involve basic educational policy, yet also significantly affect teachers' working conditions. Courts have developed two major strategies for resolving this dilemma: the severability doctrine and the balancing test.

A. *The Severability Doctrine*

The severability doctrine accommodates the competing interests of school districts and teachers by separating the nonnegotiable policy aspects of a bargaining proposal from negotiable elements. This is achieved by requiring negotiation over the procedure[112] and impact[113]

108. *Id.* at 446-47, 530 P.2d at 117.

Nevada subsequently enacted a list statute which limits the scope of bargaining to a specified number of enumerated topics. See NEV. REV. STAT. § 288.150(2) (1987).

109. *See, e.g.*, St. Paul Fire Fighters, Local 21 v. City of St. Paul, 336 N.W.2d 301, 302 (Minn. 1983) (recognizing that many inherent managerial policies can concomitantly and directly affect terms and conditions of employment); School Dist. of Drummond v. Wisconsin Employment Relations Comm'n, 121 Wis. 2d 126, 134, 358 N.W.2d 285, 289 (1984) (statutory recognition of employee and employer interests creates difficulties when proposal touches simultaneously on working conditions and managerial decisions).

110. *See, e.g.*, West Hartford Educ. Ass'n v. DeCourcy, 162 Conn. 566, 295 A.2d 526 (1972) (class size is a mandatory subject); Kenai Peninsula Borough School Dist. v. Kenai Peninsula Educ. Ass'n, 572 P.2d 416 (Alaska 1977) (class size is not a mandatory subject); West Irondequoit Teachers Ass'n v. Helsby, 35 N.Y.2d 46, 315 N.E.2d 775, 358 N.Y.S.2d 720 (1974) (class size not mandatory, but impact of class size on working conditions mandatory).

111. *See, e.g.*, Eastbrook Community Schools Corp. v. Indiana Educ. Employment Relations Bd., 446 N.E.2d 1007 (Ind. Ct. App. 1983) (school calendar decision is within school board's exclusive managerial prerogative); Board of Educ. v. Wisconsin Employment Relations Comm'n, 52 Wis. 2d 625, 191 N.W.2d 242 (1971) (school calendar constituted negotiable "condition of employment").

112. Cases which deny bargaining over policy but require bargaining over procedure are extremely common. *See, e.g.*, Jones v. Wrangell School Dist., 696 P.2d 677 (Alaska 1985) (nonretention decision not mandatory, but nonretention procedures negotiable); United Pub. Employees, Local 390/400, SEIU, AFL-CIO v. City and County of San Francisco, 190 Cal. App. 3d 419, 235 Cal. Rptr. 477 (1987) (amount of compensation is nonnegotiable, but procedure by which compensation is determined is negotia-

of policy decisions, while preserving the basic policy choice for the school district.

Minnesota courts have clearly articulated a "severability" test and frequently apply it to resolve overlap problems.[114] In *Minneapolis Federation of Teachers, Local 59 v. Minneapolis Special School District No. 1*,[115] the Minnesota Supreme Court stated that if an inherent managerial policy decision is severable from its implementation, then negotiation is mandatory with respect to issues of implementation that affect working conditions.[116] In applying this principle, the court held the decision to transfer teachers was a nonnegotiable managerial prerogative, but the criteria for determining which teachers would be transferred was negotiable.[117]

Similarly, in *Kansas Board of Regents v. Pittsburgh State University Chapter of Kansas-NEA*,[118] the Kansas Supreme Court held that final decisions regarding teacher promotion,[119] summer employment,[120]

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ble); Three Village Teachers' Ass'n v. Three Village Cent. School Dist., 128 A.D.2d 626, 512 N.Y.S.2d 878 (1987) (teacher qualifications); Board of Educ. of Elwood Union Free School Dist. v. Elwood Teachers Alliance, 94 A.D.2d 692, 461 N.Y.S.2d 891 (1983) (tenure).

113. Cases that deny bargaining over managerial policy decisions but grant bargaining over the impact of policy decisions on working conditions are also extremely common. *See, e.g.*, United Teachers of Flint v. Flint School Dist., 158 Mich. App. 138, 404 N.W.2d 637 (1986) (decision to eliminate teaching position is managerial prerogative, but impact of decision to transfer teaching duties from eliminated positions is mandatory subject); City of Newburg v. Public Employment Relations Bd., 97 A.D.2d 258, 470 N.Y.S.2d 799 (1983) (impact of city's policy to reduce shift manning levels of fire fighters is mandatory).

114. *See* St. Paul Fire Fighters, Local 21 v. City of St. Paul, 336 N.W.2d 301, 302 (Minn. 1983); Ogilvie v. Independent School Dist. No. 341, 329 N.W.2d 555, 558 (Minn. 1983); Minneapolis Ass'n of Admin. and Consultants v. Minneapolis Special School Dist. No. 1, 311 N.W.2d 474, 476 (Minn. 1981).

115. 258 N.W.2d 802 (Minn. 1977).

116. *Id.* at 805.

117. *Id.* The Minnesota Supreme Court has subsequently noted that bargaining with regard to implementation of policy may proceed only if policy and implementation are not "inextricably interwoven." *See Minneapolis Ass'n of Admin. and Consultants*, 311 N.W.2d at 476 (because policy and criteria for determining personnel reductions were inextricably interwoven, criteria was not negotiable).

118. 233 Kan. 801, 667 P.2d 306 (1983). *See* Note, *Mandatory Subjects of Bargaining Under the Kansas Public Employer-Employee Relations Act*, 32 U. KAN. L. REV. 697 (1984) (discussing this case in detail).

119. 233 Kan. at 826, 667 P.2d at 322.

120. *Id.*

tenure,[121] and reduction in workforce[122] were managerial prerogatives, but proposals regarding the criteria, methods, and procedures related to those decisions were negotiable.[123]

A second variation of the severability method separates the policy aspects of a disputed bargaining proposal from the impact of the policy on working conditions.[124] In *City of Beloit v. Wisconsin Employment Relations Commission*,[125] the Wisconsin Supreme Court held that the school board was required to bargain over the impact of educational policy on wages, hours, and conditions of employment.[126] Employing this principle, the court held that fundamental *decisions* concerning calendar days,[127] class size,[128] and the initiation of summer school[129] were not subject to mandatory bargaining, but the *impact* of these decisions on working conditions was negotiable.[130] Consequently, although teachers could not bargain over how many students would occupy the average classroom or the number of days in the school year, they could bargain over enhanced compensation for increased class sizes or additional teaching days.[131]

C. *Impact Balancing*

Courts facing the overlap problem increasingly depend on a case-by-case balancing test which weighs the effect of a bargaining proposal on working conditions against the burden the proposal imposes on basic policy decisions.[132] This approach, described typically as a "direct af-

121. *Id.* at 826-27, 667 P.2d at 322-23.

122. *Id.* at 827-28, 667 P.2d at 323.

123. *Id.* at 826-28, 667 P.2d at 322-23.

124. *See supra* note 113 (listing cases).

125. 73 Wis. 2d 43, 242 N.W.2d 231 (1976).

126. *Id.* at 54, 242 N.W.2d at 236. The court also held that matters which are "primarily related" to wages, hours, and conditions of employment are subject to mandatory bargaining. *Id.*

127. *Id.* at 61-62, 242 N.W.2d at 239-40.

128. *Id.* at 63-64, 242 N.W.2d at 240-41.

129. *Id.* at 65-66, 242 N.W.2d at 241-42.

130. *Id.* at 61-66, 242 N.W.2d at 239-42.

131. *Id.* The court also addressed proposals concerning teacher's files, notice procedures for nonrenewal of contracts, disciplinary standards, layoffs, student discipline, and in-service training. Using the "primarily related" test, the court held all of the proposals mandatory. *Id.*

132. *See, e.g.*, State v. State Supervisory Employees Ass'n, 78 N.J. 54, 393 A.2d 233 (1978) (bargainable matters are those which intimately and directly affect the work and

fect,"[133] "primarily related,"[134] or "material affect"[135] test, resolves scope of bargaining disputes by determining whether a proposal has a closer relationship to working conditions or to educational policy.[136]

The Kansas Supreme Court first articulated this test in *NEA of Shawnee Mission v. Board of Education of Shawnee Mission Unified School District No. 512.*[137] Noting that "policy" and "terms of employment" were not mutually exclusive, the court suggested that the key to resolving scope disputes involved weighing the impact of an issue on the well-being of the individual teacher against its effect on the operation of the school system as a whole.[138]

D. *Comprehensive Balancing Formulas*

While traditional impact balancing focuses primarily on the competing interests of employers and employees, courts in California, New

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welfare of public employees without significantly interfering with the exercise of inherent management prerogative); Sutherlin Educ. Ass'n v. Sutherlin School Dist., 25 Or. App. 85, 548 P.2d 204 (1976) (courts should balance the element of educational policy against the subject's effect on a teacher's employment); Pennsylvania Labor Relations Bd. v. State College Area School Dist., 461 Pa. 494, 337 A.2d 262 (1975) (courts should balance whether the impact on working conditions outweighs its probable effect on the basic policy of the system as a whole).

133. School Dist. of Seward Educ. Ass'n v. School Dist. of Seward, 188 Neb. 772, 199 N.W.2d 752 (1972) (bargainable issues should coincide with those matters directly affecting the teacher's welfare).

134. City of Beloit v. Wisconsin Employment Relations Comm'n, 73 Wis. 2d 43, 242 N.W.2d 231 (1976). *See supra* note 126.

135. Aberdeen Educ. Ass'n v. Aberdeen Bd. of Educ., 88 S.D. 127, 215 N.W.2d 837 (1974).

136. The "impact balancing" approach and the severability doctrine are similar, but distinct, concepts. The former method does not separate different aspects of a bargaining topic, but considers whether the topic as a whole has a greater impact on educational policy or working conditions. However, some courts employ both methods by initially separating policy from procedure and then applying a balancing test to determine the negotiability of each aspect of the proposal. *See, e.g., City of Beloit*, 73 Wis. 2d at 54, 242 N.W.2d at 236 (applying both methods); Kansas Bd. of Regents v. Pittsburgh State Univ. Chapter of Kansas-NEA, 233 Kan. 801, 826-28, 667 P.2d 306, 322-23 (1983) (court applies "significantly related" test after distinguishing policy from criteria, methods, and procedures).

137. 212 Kan. 741, 512 P.2d 426 (1973).

138. *Id.* at 753, 512 P.2d at 435. Kansas has subsequently replaced its "impact balancing" test with the "topics" approach. *See* KAN. STAT. ANN. § 72-5413(L) (1985) (listing mandatory subjects of bargaining); Unified School Dist. No. 501 v. Secretary of Kansas Dep't of Human Resources, 235 Kan. 968, 685 P.2d 874 (1984) (holding that under the topics approach, items "relating to" those enumerated in statute were mandatory).

Jersey, and Wisconsin have developed more sophisticated balancing formulas which attempt to reconcile a wider range of conflicting interests. These formulas characteristically embody a number of the traditional theories that courts have developed to resolve scope disputes.

In *In re Local 195, IFPTE, AFL-CIO v. State*[139] the New Jersey Supreme Court adopted a three-part balancing test to determine negotiability.[140] The first prong incorporates the impact balancing approach, stipulating that a proposal must "intimately and directly affect the work and welfare of public employees."[141] If a topic satisfies this step, the court next considers potential statutory conflicts that might result in preemption.[142] Finally, the court determines whether the proposal "significantly interferes" with managerial prerogatives related to governmental policy.[143] The court stated that defining "significant" involves balancing the interests of public employees with the requirements of democratic decision making.[144] This final step, therefore, incorporates the "political process" analysis, the "management rights"

139. 88 N.J. 393, 443 A.2d 187 (1982).

140. *Id.* at 403-05, 443 A.2d at 191-93. For a review of scope of bargaining issues in New Jersey public sector employment law, see Note, *Public Sector Labor Relations: The New Jersey Supreme Court Interprets the 1974 Amendments to the Employer-Employee Relations Act*, 32 RUTGERS L. REV. 62 (1979); Comment, *After* Ridgefield Park *and* State Supervisory Employees: *The Scope of Collective Negotiations in the Public Sector in New Jersey*, 10 SETON HALL L. REV. 558 (1980).

141. 88 N.J. at 403, 443 A.2d at 191-92. The court held that all three bargaining proposals met this first test. *Id.* at 405, 443 A.2d at 193 (subcontracting decisions that may result in layoffs); *Id.* at 411, 443 A.2d at 196 (workweek provisions); *Id.* at 413, 443 A.2d at 199 (transfer provisions). *See also* Paterson Police PBA Local No. 1 v. City of Paterson, 87 N.J. 78, 432 A.2d 847 (1981) (establishing the "intimate and direct affect on work and welfare" test).

142. 88 N.J. at 403-04, 443 A.2d at 192. The court incorporated the preemption test established in State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80-82, 393 A.2d 233, 246-47 (1978). *See supra* notes 94-98 and accompanying text (discussing this test).

143. 88 N.J. at 404, 443 A.2d at 192.

144. *Id.* The court acknowledged that negotiation will always interfere to some extent with governmental policy. *Id.* The requirement that an issue "significantly interfere" suggests a broader scope of mandatory topics.

The New Jersey Supreme Court has subsequently indicated that in determining what is "significant," the court focuses on the extent to which "students and teachers are congruently involved." *See, e.g.*, Wright v. Board of Educ. of City of E. Orange, 99 N.J. 112, 121, 491 A.2d 644, 648 (1985). Consequently, the New Jersey test implicitly incorporates the "best interest of the student" rationale.

New Jersey courts acknowledge that most bargaining proposals pass the first two prongs of the test, and that the third step is most problematic and determinative. *See* Note, *Scope of Negotiation After Rapid City*, *supra* note 5, at 136.

doctrine, and alludes to the theory of nondelegation by the use of the term "governmental policy."[145]

In *San Mateo City School District v. PERB*[146] the California Supreme Court endorsed a similar three-part comprehensive balancing formula.[147] The first prong establishes a more expansive approach than New Jersey's first step, requiring only a "logical and reasonable" relationship to working conditions, rather than a "direct and intimate" effect.[148] The second prong focuses on the public's interest in harmonious labor relations by recommending mandatory bargaining for subjects that are likely to create conflicts which could be resolved through negotiation.[149] Finally, the court allows bargaining so long as the proposal does not "significantly abridge" the employer's managerial prerogatives and fundamental policy decisions.[150]

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145. The New Jersey Supreme Court has subsequently applied this three-part test to scope disputes in public education. *See, e.g.*, Teaneck Bd. of Educ. v. Teaneck Teachers Ass'n, 94 N.J. 9, 462 A.2d 137 (1983); Township of Old Bridge Bd. of Educ. v. Old Bridge Educ. Ass'n, 98 N.J. 523, 489 A.2d 159 (1985); Wright v. Board of Educ. of the City of E. Orange, 99 N.J. 112, 491 A.2d 644 (1985).

The South Dakota Supreme Court adopted the New Jersey three-part test in Rapid City Educ. Ass'n v. Rapid City Area School Dist. No. 51-4, 376 N.W.2d 562, 564 (S.D. 1985) (concluding that the New Jersey test provides a more meaningful standard by which to determine claims of negotiability). *See generally* Note, *Scope of Negotiations After Rapid City*, supra note 5 (discussing this case).

146. 33 Cal. 3d 850, 663 P.2d 523, 191 Cal. Rptr. 800 (1983). *See supra* text accompanying notes 35-37 and 64-67 (discussing other aspects of this case).

147. California's PERB developed this test to assess the negotiability of issues that are not specifically enumerated in the list of mandatory topics in the EERA's scope provision. 33 Cal. 3d at 857-58, 663 P.2d at 528, 191 Cal. Rptr. at 805. The court noted that the interpretation of scope provisions fell within PERB's area of expertise, and that the court would uphold PERB's construction unless it was clearly erroneous. *Id.* at 856, 663 P.2d at 527, 191 Cal. Rptr. at 804.

148. *Id.* at 858, 663 P.2d at 528, 191 Cal. Rptr. at 805. This first prong also provides for negotiation if the term is logically and reasonably related to a specifically enumerated term and condition of employment. *Id.*

149. *Id. See* Summers, *Labor Law in the Supreme Court: 1964 Term*, 75 YALE L.J. 59, 62 (1965). The author develops a test from which California's second step may have derived. Summers would recommend negotiability if the subject is of such vital concern to both labor and management that it is likely to lead to controversy, and if collective bargaining is appropriate for resolving such issues. *Id.*

See Bowles, *supra* note 5, at 651-52 (advancing the "safety valve" theory which dictates that any subject that might create friction should be aired and brought through impasse procedures). *See supra* notes 99-101 and accompanying text (discussing the harmonious labor relations rationale).

150. 33 Cal. 3d at 858, 663 P.2d at 528, 191 Cal. Rptr. at 805. This step also serves to expand the scope of bargaining because only topics that "significantly abridge" man-

The Supreme Court of Wisconsin applied a similar test in *West Bend Education Association v. Wisconsin Employment Relations Commission*.[151] The court adopted a "primarily related" standard to weigh the impact of a layoff procedure proposal on several competing interests.[152] In deciding whether the proposal was mandatory or permissive, the court asked if it was primarily related to working conditions, educational policy, school management, or public policy.[153] This inquiry required the court to balance the employees' interest in timely layoff notification against the school district's interest in directing educational and administrative policy, and the public's interest in the political process and efficient government.[154] Although the court acknowledged the district's strong managerial and public policy interests in the fiscal operation of the school system, it held that the proposal was mandatory because it had a greater impact on working conditions.[155]

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agerial prerogative will be found to be nonnegotiable. *See supra* note 144 (discussing New Jersey's "significant interference" test).

151. 121 Wis. 2d 1, 357 N.W.2d 534 (1984).

152. *Id.* at 8, 357 N.W.2d at 538. *See* WIS. STAT. § 111.70(1)(d) (1971) (defining public employer's rights and obligations in regard to collective bargaining).

153. 121 Wis. 2d at 8, 357 N.W.2d at 538.

154. *Id.* at 9, 357 N.W.2d at 538. The court criticized the initial ruling by the Wisconsin Employment Relations Commission (WERC) for focusing only on the impact of the proposal on the employer, without giving sufficient attention to employees' interest in working conditions and the public's political interests. As a result, the court declined to defer to WERC's ruling. *Id.* at 14-15, 357 N.W.2d at 540-41.

155. *Id.* at 20-21, 357 N.W.2d at 543. The court noted that the proposals did not "significantly abridge" the district's powers, and that teachers had an "acute interest" in the timing of the notice of layoffs. Therefore, the court held that proposals relating to the timing and effective date of layoffs were mandatory subjects of bargaining. *Id.*

See generally Weisberger, *The Appropriate Scope of Bargaining in the Public Sector: The Continuing Controversy and the Wisconsin Experience*, 1977 WIS. L. REV. 685.

Michigan courts have also developed a comprehensive formula for resolving scope disputes. It provides that:

> Any matter which has a material or significant impact on wages, hours, or other conditions of employment or which settles an aspect of the relationship between employer and employee is a mandatory subject, except for management decisions which are fundamental to the basic direction of a corporate enterprise or which impinge only indirectly upon employment security.

Houghton Lake Educ. Ass'n v. Houghton Lake Bd. of Educ., 109 Mich. App. 1, 6, 310 N.W.2d 888, 890 (1981).

V. ANALYSIS

A. *Critique of the Traditional Limitations to Bargaining*

Judicial deference to managerial prerogatives may discourage employees' legitimate attempts to participate in the construction of a productive workplace. Although the management rights theory claims to promote efficiency by granting management unfettered decision-making powers, it may produce contrary results by generating employee dissatisfaction.[156] Allowing public employees to bargain over a wider range of topics may enhance the effectiveness of the enterprise by promoting workplace morale.[157] This is particularly true for teachers, who often measure job satisfaction by the quality of the educational services they deliver to their students.[158] Consequently, excessive regard for management rights undermines the basic purpose of collective bargaining statutes: the public's interest in harmonious labor relations and the efficient delivery of public services.[159]

The managerial prerogative theory, borrowed from the private sector, fails to account for the unique features of public sector employment. While recognizing the employer's role as business manager, this approach ignores the employer's duty as a public servant.[160] By concentrating primarily on disputes between the employer and employee, the court neglects the public's right to participate in public policy. Also, many bargaining proposals are unique to public employment, so public sector analogies are misapplied.[161] Because there is no exact

156. *See Developments, supra* note 5, at 1690; Nelson, *supra* note 5, at 453 ("[B]y excluding managerial prerogatives, courts may significantly interfere with the basic efficiency of governmental operations."); *see supra* notes 44-53 and accompanying text (discussing this theory).

157. *See* Nelson, *supra* note 5, at 455 (observing that involvement and consent are important to job satisfaction and therefore to the level of employee productivity).

158. *See* Wollett, *supra* note 54, at 1030 ("Teachers, by reason of their education, psychology, and traditions, have an interest in the quality of educational programs.").

159. *See Developments, supra* note 5, at 1690 ("[S]trict notions of managerial prerogative contravene the legislative mandate underlying public sector bargaining statutes.").

160. *See Developments, supra* note 5, at 1691 (arguing that the management rights doctrine fails to account for the public employer's role as political decisionmaker).

161. *See* Nelson, *supra* note 5, at 441 (arguing that application of private sector concepts and principles to the public sector is not helpful); Ridgefield Park Educ. Ass'n v. Ridgefield Bd. of Educ., 78 N.J. 144, 159, 393 A.2d 278, 285 (1978) ("[F]ederal precedents concerning the scope of bargaining in the private sector are of little value in determining . . . negotiability in public employment.").

equivalent to student discipline or curriculum in the private sector, the use of private sector models may result in vague, imprecise judicial analysis.[162]

Courts employing the political process model overlook the democratic nature of the bargaining process itself.[163] Employee negotiations with management can "break the bureaucratic shield" and thereby expand participation in public policy determinations.[164] Collective bargaining embodies the principles of participatory and representative government by incorporating the views of workers in the decision-making process. In the public school context, negotiations may enhance pluralistic decision making. School boards, who often lack educational training and rely on school administrators to set educational policy, could gain additional insights from professional teachers through bargaining.[165]

Furthermore, the political process model may fail to protect the legitimate rights of workers. Many commentators challenge the assertion that public employee unions wield undue influence by noting that they have not achieved significant improvements in wages and working conditions.[166] These commentators contend that public employees need collective bargaining to defend against citizens who demand lower tax rates without diminished services.[167]

Finally, the political process model does not provide sufficient guidance for judicial analysis. Courts may have difficulty resolving scope disputes if they are required to determine which topics should be subjected to the political process.[168] Such determinations may require de-

162. *See* Nelson, *supra* note 5, at 441 (suggesting that because there is no private sector experience with class size, application of private sector principles may result in waste of time and energy).

163. *See Developments*, *supra* note 5, at 1695 (noting that supporters of bargaining characterize it as a "system that promotes workplace democracy"). *See supra* notes 54-67 and accompanying text (discussing this theory).

164. Cohen, *supra* note 54, at 194.

165. Nelson, *supra* note 5, at 468.

166. *See, e.g.*, Cohen, *supra* note 54, at 195 (noting that in many cities, municipal unions have settled for little or no increase in wages and benefits).

167. *See Developments*, *supra* note 9, at 1695; C. Summers, *supra* note 54, at 1167 ("[I]n the political process of budget-making, public employees seeking general increases have few natural allies."); Cohen, *supra* note 54, at 195 ("[T]he challenge for public employee unions has been to cope with a backlash directed against their success.").

168. Nelson, *supra* note 5, at 466 (noting that "it may be risky business to attempt to determine which items may become hot political issues").

tailed knowledge of local politics[169] and are susceptible to the political biases of the deciding judge.[170]

Judicial reliance on the nondelegation theory places unwarranted restrictions on the scope of bargaining.[171] This theory justifies unilateral governmental decisions by invoking the shield of "sovereignty,"[172] thereby allowing public employers to circumvent the statutory duty to bargain in good faith. Because the nondelegation theory prohibits bargaining over policy decisions, employees may feel excluded from those issues which most concern them.[173] By not recognizing permissive subjects, this approach denies both parties the freedom to negotiate voluntarily over policy issues. Excluding permissive subjects undermines harmonious labor relations, especially in public education, where administrators could improve relations by inviting teachers to make productive contributions to educational policy.[174]

Furthermore, advocates of the nondelegation theory misperceive the negotiation process. Management is only required to bargain with employees, but is not obligated to agree; bargaining gives employees the opportunity to be heard, not the power to enact laws.[175] Because governmental authority is not delegated in the negotiating process, most courts reject this theory or limit its application to proposals that violate explicit legislative prohibitions against certain bargaining topics.

B. *Comprehensive Balancing Formulas*

The comprehensive balancing approach adopted by the California

169. *Id.*

170. *See Developments, supra* note 5, at 1698 (arguing that vague statutory definitions of public policy force courts to make "openly political judgments about the appropriate balance of power").

171. Bowles, *supra* note 5, at 656 (arguing that technically, the illegal delegation doctrine would preclude all public employee collective bargaining); *see supra* notes 68-76 and accompanying text (discussing this theory).

172. *See Developments, supra* note 5, at 1688; Nelson, *supra* note 5, at 452 ("Sovereignty has been used to justify unilateral, inequitable decisions by governmental administrators.").

173. Nelson, *supra* note 5, at 453 ("It may be that the excluded nonmonetary items are actually of greater concern to teachers.").

174. *Id.* at 454 (citing a poll showing that 90% of Los Angeles teachers felt that collective bargaining would improve teaching conditions primarily by allowing teachers to be heard in the decision-making process).

175. Sutherlin Educ. Ass'n v. Sutherlin School Dist. No. 130, 548 P.2d 204, 205 (Ore. 1976); Kenai Peninsula Borough School Dist. v. Kenai Peninsula Educ. Ass'n, 572 P.2d 416, 421 (Alaska 1977); Nelson, *supra* note 5, at 451.

Supreme Court in *San Mateo* is an exemplary model for the resolution of scope disputes.[176] This approach ensures a careful weighing of the competing interests while avoiding unnecessary limitations to the scope of bargaining.

Initially, the court's rejection of a restrictive reading of the list statute makes unenumerated items potentially bargainable and promotes the flexibility necessary to accommodate the evolution of labor relations.[177] A literal reading, on the other hand, would stagnate judicial innovation and invite superficial analysis by limiting the court's role to categorizing unenumerated items.

The first step of the court's three-part analysis requires a topic to be logically and reasonably related to hours, wages, or an enumerated condition of employment.[178] This step substantially reduces the burden traditionally imposed on employees by the "primarily related" or "material affect" tests, which tend to resolve issues in favor of school districts unless teachers can make a strong showing of a direct impact on working conditions.[179] This minimum level of judicial scrutiny gives teachers enhanced bargaining ability by broadening the range of mandatory subjects.

The second step also broadly defines bargainable issues as those which are likely to generate conflict that could be resolved through negotiations.[180] This step injects a practical, behavioral element into the judicial analysis.[181] Rather than applying artificial labels to bargaining topics, this approach determines whether a topic is mandatory by examining how passionately employees feel about it.[182] This step

176. *See, e.g.*, Biddeford v. Biddeford Teachers Ass'n, 304 A.2d 387 (Me. 1973); Joint School Dist. No. 8 v. Wisconsin Employment Relations Bd., 37 Wis. 2d 483, 494, 155 N.W.2d 78, 83 (1967); *but see* Dearborn Firefighters Union v. Dearborn, 394 Mich. 229, 231 N.W.2d 226 (1975).

177. *See supra* notes 146-50 and accompanying text (presenting the *San Mateo* balancing test).

178. 33 Cal. 3d 850, 862, 663 P.2d 523, 531, 191 Cal. Rptr. 800, 808 (1983). *See supra* notes 33-37 and accompanying text (discussing the court's statutory interpretation).

179. 33 Cal. 3d at 858, 663 P.2d at 528, 191 Cal. Rptr. at 805.

180. *See* Bowles, *supra* note 5, at 658 (arguing that the direct impact test creates a presumption in favor of a subject being educational policy which has resulted in an overwhelming number of cases resolved in favor of school boards).

181. 33 Cal. 3d at 858, 663 P.2d at 528, 191 Cal. Rptr. at 805.

182. *See* Bowles, *supra* note 5, at 659 (arguing that the impact balancing test should be behaviorally restated as, "Would teachers feel strongly enough about this subject to strike illegally?").

encourages negotiations by focusing on the fundamental goal of collective bargaining statutes — the promotion of harmonious labor relations.

The final step acknowledges the managerial prerogative theory, but limits its application to items that significantly abridge management's freedom to make policy decisions.[183] This approach prevents the unjustified invocation of the management rights doctrine and encourages bargaining over a wider range of topics.

The court also declined to accept the political process model as a limitation to bargaining.[184] Instead, the court offered a more productive solution by pointing to the state's "sunshine law," which requires the submission of contract proposals to public review and debate.[185] This approach guarantees public participation in the decision-making process without imposing restrictions on the scope of bargaining.

VI. CONCLUSION

Comprehensive balancing formulas provide a succinct yet thorough tool for resolving scope of bargaining issues. By incorporating several of the traditional theories of analysis, courts can avoid the biases that result from exclusive dependence on one method. This hybrid approach prevents superficial review of scope disputes by requiring courts to address a variety of competing interests and by exposing to public view the detailed reasoning process used to determine negotiability. Comprehensive balancing formulas, combined with a liberal view of what constitutes a mandatory subject of bargaining, can promote equitable and productive resolutions to labor disputes in the public sector.[186]

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183. *See* Summers, *supra* note 149, at 62 (advocating a similar test).

184. 33 Cal. 3d at 858, 663 P.2d at 528, 191 Cal. Rptr. at 805.

185. *Id.* at 864, 663 P.2d at 532, 191 Cal. Rptr. at 809.

186. *Id. See* CAL. GOV'T CODE § 3547 (West 1980).

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